1989

State of Utah v. Walter Kent Bingham : Brief of Respondent

Utah Court of Appeals

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Michael D. Esplin; Aldrich, Nelson, Weight and Esplin; Attorneys for Appellant.

 IN THE UTAH COURT OF APPEALS

STATE OF UTAH, :

Plaintiff-Respondent, . Case No. 890149-CA

v. :

WALTER KENT BINGHAM, : Category No. 2

Defendant-Appellant. :

BRIEF OF RESPONDENT

APPEAL FROM A CONVICTION OF THEFT BY RECEIVING, A THIRD DEGREE FELONY, IN THE FOURTH JUDICIAL DISTRICT COURT, IN AND FOR UTAH COUNTY, STATE OF UTAH, THE HONORABLE GEORGE F. BALLIF, JUDGE, PRESIDING.

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November 7, 1988

Mary T. Noonan
Clerk of the Court
Utah Court of Appeals
400 Midtown Plaza
230 South 500 East
Salt Lake City, Utah 84102

Re: State v. Bingham, Case No. 890149-CA

Dear Ms. Noonan:

I wish to cite to the Court State v. Belt, 118 Utah Adv. Rep. 54, 56 (Utah Ct. App. 1989), as additional authority in support of the State's argument in State v. Bingham that there was sufficient evidence to support defendant's conviction of theft by receiving. See Br. of Resp. at 5-8.

This supplemental authority is submitted pursuant to R. Utah Ct. App. 24(j).

Sincerely,

David B. Thompson

DAVID B. THOMPSON
Assistant Attorney General
Chief, Governmental Affairs Divisio

DBT:bks

cc: Michael D. Esplin

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BRIEF OF RESPONDENT

JURISDICTION AND NATURE OF PROCEEDINGS

This appeal is from a conviction of theft by receiving, a third degree felony, under Utah Code Ann. §§ 76-6-408 and -412 (Supp. 1989).

This Court has jurisdiction to hear the appeal under Utah Code Ann. § 78-2a-3(2)(f) (Supp. 1989).

STATEMENT OF ISSUES PRESENTED ON APPEAL

The sole issue on appeal is whether there was sufficient evidence to support defendant's conviction.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

The following statutory provision is pertinent to the resolution of the issue presented on appeal:

Utah Code Ann. § 76-6-408(1) (Supp. 1989):

> A person commits theft if he receives, retains, or disposes of the property of another knowing that it has been stolen, or believing that it probably has been stolen, or who conceals, sells, withholds or aids in concealing, selling, or withholding any such property from the owner, knowing the property

to be stolen, with a purpose to deprive the owner thereof.

STATEMENT OF THE CASE

Defendant, Walter Kent Bingham, was charged with theft by receiving, a third degree felony, under Utah Code Ann. §§ 76-6-408 and -412 (Supp. 1989) (R. 17). A jury found him guilty as charged (R. 48). On September 22, 1987, the trial court sentenced defendant to an indeterminate term not to exceed five years in the Utah State Prison, that sentence to run concurrently with the sentence he was currently serving, and ordered defendant to pay restitution as a condition of parole (R. 54-55). Because defendant's appointed counsel failed to perfect defendant's first appeal, on February 15, 1989, the trial court resentenced defendant, nunc pro tunc, to allow him to pursue the instant appeal (R. 93-94).

STATEMENT OF THE FACTS

On January 17, 1987 at approximately 9:00 p.m., an officer with the Utah County Sheriff's Office observed a vehicle traveling at a high rate of speed. The officer pursued the vehicle for approximately one mile before it stopped in response to the siren and overhead lights. As the officer approached the stopped vehicle, he noticed that the driver, later identified as defendant, and the passenger, later identified as Linda Bingham, appeared to be doing something with their hands between the front bucket seats. As he got closer, the officer saw Ms. Bingham attempt to spread newspaper over cigarette cartons in the back seat (R. 132-37).

Upon questioning by the officer, defendant falsely indicated that his name was "Danny Bingham" and gave an incorrect birthdate; the passenger, however, gave her correct name. Ms. Bingham explained that the cigarette cartons were in the vehicle when she and defendant had picked it up from a friend that night, and that it was her brother, a vendor of some type, who stored the cigarettes in the friend's vehicle. At that point, the officer, noting that it was unlikely that a vendor would have cigarettes of varying brands in a beer carton, placed defendant and Ms. Bingham under arrest and transported them to the jail. Their vehicle was impounded, and pursuant to an inventory search, additional cartons of cigarettes contained in large beer boxes were discovered in the trunk (R. 136-41).

In the booking area of the jail, another officer observed defendant mouth the words "Don't say anything about the cigarettes" to Ms. Bingham who was on the other side of a door from defendant. When that officer later questioned defendant, defendant admitted that he had lied about his name at the scene of the vehicle stop and then gave his correct name and birthdate. Defendant and Ms. Bingham both indicated that the cigarettes must have belonged to Lyndalee Prater, the registered owner of the vehicle and from whom they had borrowed the vehicle. At trial, the officer identified 32 cartons of cigarettes recovered from the vehicle defendant was driving as being merchandise from 7-Eleven stores (R. 147-51).[1]

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[1] The 32 cartons of cigarettes were marked as State's Exhibit No. 1. In response to an objection by defendant, the trial court did not allow that exhibit to be identified as "cigarettes . . .

Bob Tulin, supervisor for Southland Corporation 7-Eleven Stores, testified that based on his knowledge of code numbers on cigarette cartons, he could identify 30 of the recovered cartons of cigarettes as ones delivered to five different 7-Eleven stores in Orem, Pleasant Grove, and Springville. However, he gave no testimony that any of those stores had reported any cigarettes missing or stolen (R. 158-61).

Finally, Lyndalee Prater testified that she had loaned her vehicle to defendant in the early afternoon of January 17, 1987, and that it did not at that time contain any cartons of cigarettes. She also acknowledged that no one used her vehicle for the storage of cartons of cigarettes (R. 162-63).

At the completion of the State's case, defendant moved to dismiss the charge on the ground that no evidence had been presented that the cigarettes were in fact stolen. The prosecutor argued that it did not matter whether the cigarettes were actually stolen, maintaining that the State need only prove that defendant either knew that they were stolen or believed that they probably had been stolen. The court denied defendant's motion and allowed the case to go to the jury (R. 168-73).

SUMMARY OF ARGUMENT

Under the applicable standards of review, there was sufficient, albeit marginally sufficient, evidence to support defendant's conviction of theft by receiving.

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[1] Cont. stolen from 7-Eleven Stores[.]" Rather, it limited the identification to "merchandize [sic] from the 7-Eleven Stores" (R. 151).

ARGUMENT

POINT I

THERE WAS SUFFICIENT EVIDENCE PRESENTED AT TRIAL TO SUPPORT DEFENDANT'S CONVICTION.

Defendant argues that the evidence presented by the State at trial was insufficient to support his conviction of theft by receiving under Utah Code Ann. § 76-6-408(1) (Supp. 1989) on two grounds: (1) there was no evidence that the cigarettes had in fact been stolen, and (2) there was insufficient evidence that defendant either knew the cigarettes were stolen or believed they probably were stolen. Each of these points is based squarely on the absence of any evidence that the cigarettes actually were stolen property.

In State v. Booker, 709 P.2d 342 (Utah 1985), the Utah Supreme Court set out the well established standard for appellate review of the sufficiency of evidence to support a jury verdict in a criminal case. It stated:

> [W]e review the evidence and all inferences which may reasonably be drawn from it in the light most favorable to the verdict of the jury. We reverse a jury conviction for insufficient evidence only when the evidence, so viewed, is sufficiently inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime of which he was convicted.
>
> In reviewing the conviction, we do not substitute our judgment for that of the jury. "It is the exclusive function of the jury to weigh the evidence and to determine the credibility of the witnesses . . . ." . . . So long as there is some evidence, including reasonable inferences, from which findings of

> all the requisite elements of the crime can reasonably be made, our inquiry stops. . . .

709 P.2d at 345 (citations omitted). See also State v. Pacheco, 114 Utah Adv. Rep. 36, 39 (Utah Ct. App. 1989).

Defendant correctly notes that State v. Ramon, 736 P.2d 1059 (Utah Ct. App. 1987), cert. denied, 765 P.2d 1277 (Utah 1987), sets out the elements of theft by receiving as follows:

> (1) property belonging to another has been stolen;
>
> (2) the defendant received, retained or disposed of the stolen property;
>
> (3) at the time of receiving, retaining or disposing of the property the defendant knew or believed the property was stolen; and
>
> (4) the defendant acted purposely to deprive the owner of the possession of the property.

736 P.2d at 1062 (citing State v. Murphy, 617 P.2d 399, 401 (Utah 1980)). However, in making his specific insufficiency claim, he fails to note State v. Pappas, 705 P.2d 1169 (Utah 1985) (discussed by this Court in Ramon, 736 P.2d at 1063), where the Utah Supreme Court held that, in order to convict a defendant of theft by receiving under the first portion of § 76-6-408(1) (i.e., "A person commits theft if he receives, retains, or disposes of the property of another knowing that it has been stolen, or believing that it probably has been stolen[.]"), the State does not have to prove the property actually was stolen, only that the defendant believed the property probably has been stolen. 705 P.2d at 1172-73. Therefore, the absence of any evidence in the instant case that the cigarettes were in fact stolen property does not render the evidence insufficient to

support defendant's conviction. Defendant was charged under the first part of § 76-6-408(1) (R. 17), and the jury was instructed accordingly (Instruction Nos. 4, 5, and 6; R. 33-35).[2] Under Pappas, the jury was not required to find that the cigarettes were stolen. And, although the evidence concededly was not overwhelming on the issue of defendant's culpable mental state, the jury could have reasonably inferred form the circumstances (i.e., defendant's attempt, albeit aborted, to flee the officer; Ms. Bingham's effort to cover up the cigarettes in the back seat with a newspaper; defendant's giving of a false name and birthdate to the officer at the scene of the stop; the highly unlikely explanation for the cigarettes' presence in the car given by Ms. Bingham; defendant's subsequent inconsistent explanation given at the jail that the cigarettes must have belonged to the owner of the vehicle that he had borrowed earlier that evening; and, defendant's mouthing the words "Don't say anything about the cigarettes" to Ms. Bingham at the jail) that defendant believed the cigarettes probably had been stolen. In short, the evidence was at least marginally sufficient to support defendant's conviction under the first part of § 76-6-408(1). Cf. State v. Hill, 727 P.2d 221, 223-25 (Utah 1986) (Zimmerman, J., concurring in the result, and Hall, C.J., dissenting) (where a majority of the Court determined that the evidence was at least

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[2] For some unexplained reason, Instruction No. 6 also incorporates the latter part of § 76-6-408(1). However, defendant does not raise that as an issue on appeal. In any event, taken in context, that deficiency, if error, was harmless.

marginally sufficient to support the defendant's burglary and theft by receiving convictions).

CONCLUSION

Based upon the foregoing argument, this Court should affirm defendant's conviction.

RESPECTFULLY submitted 25th day of September, 1989.

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Attorney General

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DAVID B. THOMPSON
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that four true and accurate copies of the foregoing Brief of Respondent were mailed, postage prepaid, to Michael D. Esplin, attorneys for defendant, 43 East 200 North, P.O. Box "L", Provo, Utah 84603-0200 this 25th day of September, 1989.

David B. Thompson